Supreme Court, U. S.
FILED
AUG 23 1974
MICHAEL RODAK, JR., CLERK

No. 74-16

# In the Supreme Court of the United States

HARRISON J. CHERAMIE, JR.,
Petitioner,

v.

HONORABLE BEN C. TUCKER, ET AL,
Respondents.

## OPPOSITION OF STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISIONS OF THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS AND REQUEST FOR SUMMARY REVERSAL

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## ISSUES PRESENTED

(1) Is the State of Louisiana, through the Department of Highways, a "person" under 42 U.S.C. 1983?

(2) Does the Louisiana system of appellate review of both fact and law violate the United States Constitution?

(3) Did the lower court err in dismissing plaintiff's claim under 42 U.S.C. 1983 and in granting summary judgment in favor of the State of Louisiana, through the Department of Highways; and, did the United States Fifth Circuit Court of Appeals err in affirming the judgment of the district court and in denying petitioner's application for rehearing?

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## STATEMENT OF THE CASE

*May it Please the Court:*

This is an action, sounding in tort and based on negligence, in which plaintiff complains of injuries received when he swerved to avoid another motorist at a "T" intersection. His vehicle left the road and he was seriously injured. The other motorist carried no liability insurance. To that stage, plaintiff's case was quite an ordinary one. Its history in the courts, however, has been quite extraordinary.

Plaintiff's suit in state district court against the

Department of Highways of the State of Louisiana for alleged negligence was tried before a Louisiana district judge, who awarded plaintiff a large money judgment, totalling more than $1.2 million.

Pursuant to the provisions of Article 7, Section 29 of the Louisiana Constitution, the case was appealed by defendant to the First Circuit Court of Appeal of the State of Louisiana. In that court, the matter was assigned to a three-judge panel consisting of Judges Ben N. Tucker, Frederick A. Blanche, Jr. and Paul B. Landry, Jr., named defendants in the present action. This original panel of appellate judges *found that the trial court had committed manifest error and that the plaintiff had, as a matter of law, failed to carry the burden of proof.* Accordingly, that court reversed the lower court's judgment.

Plaintiff requested a re-hearing, but this was denied—not, as asserted by plaintiff repeatedly in this and other briefs, by the same three judges but by an *en banc* panel of the First Circuit, consisting of the original three members of the panel and two additional appellate judges. The vote to deny rehearing was unanimous.

Plaintiff then applied to the Louisiana Supreme Court for a writ of certiorari or review. In accordance with the procedures of that court, the application was presented in succession to each justice and, when four had concurred in the denial, the application was denied. There were no dissents to the denial.

Still unsatisfied, plaintiff applied to the Supreme

Court of the United States for a writ of review and/or certiorari, claiming that he had been denied due process under the Fourteenth Amendment to the United States Constitution. On February 20, 1973, the Supreme Court of the United States denied the petition (No. 72-913), 410 U.S. 931, 35 L.Ed. 2d 593, 93 S. Ct. 1372.

Yet determined, plaintiff filed an action in the federal district court for the Middle District of Louisiana against the three appellate judges of the Louisiana First Circuit Court of Appeal, *and against the Department of Highways*, the original defendant in the state court action. Asserting that the judges were "persons" depriving him of his civil rights guaranteed by the Fourteenth Amendment and 42 U.S.C. 1983, plaintiff prayed that the judgment of the Louisiana appellate judges be set aside *and that the original judgment be reinstated.*

The federal district court, having duly considered plaintiff's arguments, granted the motions for dismissal and for summary judgment entered by the Department of Highways and the three appellate judges named as defendants. From that judgment, plaintiff has perfected an appeal. The United States Court of Appeals, Fifth Circuit, affirmed the decision of the district court (No 73-3944), 493 F.2d 586, and, on June 6, 1974, denied rehearing.

## ARGUMENT

At the outset, it should be noted that plaintiff's ordinary tort case has now run the complete gamut

of the state and federal court systems. Of the six possible courts which could consider this case directly or by writ application, six have done so, and this is a second attempt at the Supreme Court of the United States. All three levels of the Louisiana court system have dealt with this matter; the United States Supreme Court has considered and rejected the constitutional claims here made; a federal district judge has considered and rejected the constitutional and statutory claims here made. The Fifth Circuit Court of Appeals was asked to enter the fray. Now, we have this second application to the United States Supreme Court.

Plaintiff essentially makes the same arguments here that he has made in every appellate court, but in the federal system he is trying a new wrinkle: 42 U.S.C. 1983. As the court is by now quite well aware, that statute reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State of Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

**Defendants are Not "Persons" Under 42 U.S.C. 1983**

It is of course axiomatic that this statute is a remedial one, granting an action at law or other ap-

propriate remedy to a person whose "rights, privileges, or immunities secured by the Constitution and laws" have been violated by another person. It does not define those rights, privileges and immunities, and this determination is left to other statutes and the jurisprudence. As a basis for his recovery, plaintiff claims that the judgment of the Louisiana appellate court deprived him of certain unenumerated "civil rights" and was "in violation of the due process clause of the 14th Amendment to the U. S. Constitution." (Petitioner's petition, pp. 2 and 3).

There are a number of reasons why plaintiff's latest effort, under 42 U.S.C. 1983, is totally inappropriate. First, no matter how it might otherwise be disguised, plaintiff seeks *a money judgment against the State of Louisiana through this defendant, the Department of Highways.* His prayer to the federal district court was that the judgment of the Louisiana appellate court "be set aside and that his judgment be reinstated." Of course, the effect of reinstatement of the original judgment would be an enforceable money judgment against the State of Louisiana. This is a remedy which 42 U.S.C. 1983 does not encompass. It is established beyond peradventure that the State and its political subdivisions are not "persons" within the meaning of this statute. *Williford v. People of California,* 352 F.2d 474 (9th Cir. 1965); see also *Charlton v. City of Hialeah,* 188 F.2d 421 (5th Cir. 1951). This refusal to extend the statute to a state of course encompasses the various arms of the state government as well, which are also not "persons". *Bennett v.*

*People of State of California*, 406 F.2d 36 (9th Cir. 1969), cert. den. (inapplicable to California Department of Corrections); *Allison v. California Adult Authority*, 419 F.2d 822 (9th Cir. 1969); *Sams v. New York State Board of Parole*, 352 F. Supp. 296 (S.D.N.Y. 1972) (inapplicable to State Board of Parole, state Metropolitan Transit Authority and city transit authority). Thus it is clear that no matter how plaintiff casts his argument, the result he seeks is a money judgment against the state through one of its political subdivisions (the Department of Highways) and neither is recognized as a "person" under 42 U.S.C. 1983.

Plaintiff attempts to salvage his action by naming three Louisiana appellate judges as defendants and claiming that they are the "persons" acting under color of law who have deprived him of his "civil rights." He conveniently overlooks the fact that the decision of which he complains is not a decision of individuals but is the decision of the First Circuit Court of Appeal of the State of Louisiana—another political subdivision of the state. On remarkably similar facts, as to a complaint by plaintiffs that a decision of the intermediate appellate division in New York had deprived them of their "civil rights" under Section 1983, the court in *Zuckerman v. Appellate Division, Second Dept., Supreme Court of the State of New York*, 421 F.2d 625 (2d Cir. 1970), held that the appellate division was not a "person" under the statute and affirmed the dismissal of plaintiffs' action.

In a recent decision regarding Louisiana courts,

it was held that the Louisiana Supreme Court was not a "person" within the intendment of the act, and certainly the First Circuit Court of Appeal is entitled to the same treatment. *Harris et al v. Louisiana State Supreme Court, et al.*, 334 F. Supp. 1289 (E.D. La. 1971).

Having chosen to treat the First Circuit Court of Appeal as individual judges so as to be thought to be suing "persons" under 42 U.S.C. 1983, plaintiff then is quick to point out that he is not suing these judges for damages, but only for "equitable relief." He concedes, as he must, that at common law, judges were immune to damage suits arising out of their actions taken in the exercise of the judicial function, and that 42 U.S.C. 1983 has been interpreted to continue that immunity. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). But before the Fifth Circuit he cited three cases as standing for the proposition that suits for "equitable relief" against judges are cognizable under 42 U.S.C. 1983.

As a general statement, it is correct to say that those few cases have recognized such a principle. It would perhaps have been instructive, as far as their application to the present litigation is concerned, if plaintiff had obliged the court with the nature of the harm inflicted and the relief sought in each of those cases. For example, in *Ashenhurst v. Carey*, 351 F.Supp. 708 (N. D. Ill. 1972) and in *Bilick v. Dudley*, 356 F.Supp. 945 (S.D.N.Y. 1973), the actions were brought to seek expungements of arrest records, which could be ordered only by a judge. In the latter case,

the court held the arrests reflected in the record to have been in violation of the First and Fourth Amendments and thought the proper remedy was expungement of the arrests from the record. But the court was quick to point out that its action involved no interference with any real judicial function:

> ". . . the relief . . . will have no effect upon the exercise of the judicial function. Relief against these defendants is afforded solely because they maintain the remaining records of the invalid arrests perpetrated by the police officers, and the expungement of those records is necessary to afford complete relief in this case. *Where, as here, there is no interference with any real judicial function, there is no immunity from suit under 42 U.S.C. § 1983.*"
>
> 356 F. Supp. at 953.
> (Emphasis added.)

Similar language can be found in an "equitable relief" case not cited by plaintiff, *Bramlett v. Peterson*, 307 F.Supp. 1311 (M.D. Fla. 1969), where the action was one to compel justices of the peace to appoint counsel for indigent misdemeanants. To the "judicial immunity" argument, the court's answer was:

> "In this case, where the right's guarantee is particularly clear, there is no infringement of the judicial function or judicial discretion; rather, this order affects the peace justice only if he fails to exercise a mandatory, non-discretionary, and ministerial duty. . . . ."
>
> 307 F.Supp. at 1322.

Plaintiff can hardly claim that the "equitable relief" which he claims interposes "no interference with any real judicial function." The "equitable relief" that he wants is the reversal of the considered judgment of the Louisiana First Circuit Court of Appeal, under a constitutionally-approved procedure (see Melancon v. McKeithen, *infra*), not to mention the considered judgment of the Louisiana Supreme Court and the United States Supreme Court!

Finally, in the third case cited by plaintiff, *Koen v. Long*, 302 F.Supp. 1383 (E.D. Mo. 1969), the allegations made were of a continuing conspiracy by numerous officials to deprive individuals with arguably unpopular political views of their constitutional rights. This is hardly the case presented here.

In summary, it is not even clear that plaintiff's claim here is one of "equitable relief." He denominates it as such in order to steer around the judicial immunity problem, claiming he seeks no damages against these three judges named as defendants. But the result of his suit, if successful, would be the awarding of damages against defendant, Department of Highways and the State of Louisiana. This is hardly "equitable relief" in the traditional common-law sense, not to mention that it achieves a result not permitted by the statute: recovery of damages against a state through its political subdivisions.

Plaintiff should not be permitted to split 42 U.S.C. 1983 so that it serves one purpose at one moment (suing judges instead of a court, to fulfill the

"person" requirement) and another purpose at another moment (reversing the *court's* action so that money damages can be awarded against the State of Louisiana). A house divided against itself cannot stand, and neither can this statutory construction.

**No "Rights, Privileges or Immunities" of Plaintiff Have Been Deprived**

As seen earlier, plaintiff asserts a two-fold basis for recovery in this action: deprivation of his "civil rights" and denial of due process under the 14th Amendment. The second claim can be quickly disposed of by saying that the identical claim was made in his first petition for certiorari to the United States Supreme Court, and that petition was denied. Plaintiff attempts to counter this unfavorable fact by saying that "one of the most basic rules of federal practice is that denial of writs by the United States Supreme Court means nothing one way or the other." (Petitioner's brief, p. 22). This statement might be true as to inference of court positions on general statements of law, but one can hardly say that when a constitutional claim is made by an individual in a petition for certiorari, and that petition is denied, that this "means nothing."

The first claim, though more difficult to delineate, appears to be based on the assertion that plaintiff's "civil rights" were violated by the appellate procedure provided in the Louisiana constitution, which permits appellate courts in civil cases to review both law and facts. Once again, prior decisions on the issue

stand astride plaintiff's position. In eight similar cases consolidated for argument and decided *sub nomine Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La. 1972), aff'd 409 U. S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (1972), this same appellate procedure was attacked on federal constitutional grounds and was thoroughly examined by a three-judge district court, which ruled that the procedure is constitutional.

That decision was affirmed by the United States Supreme Court.

Plaintiff attempts to distinguish these cases from the present situation by emphasizing that the court was dealing with "the requirements of due process with respect to *jury trials* and the review of *jury findings* . . . ." (Petitioner's brief, p. 14). The effort is clearly futile. Obviously, the consolidated cases were the subject of the action under 42 U.S.C. 1983 precisely because they presented the strongest claim, based as they were upon both Seventh Amendment and Fourteenth Amendment grounds. But those claims were rejected, and plaintiff presents here a much weaker claim, based now only upon Fourteenth Amendment grounds. But even so, the issue has still been decided against him: the Louisiana appellate procedure of review of the facts found by the trier of fact—be it jury or judge—does not violate the federal constitution. This was recognized by the federal district judge, who specifically held that the opinion in the consolidated cases was "sufficiently broad to cover claims made under Section 1983 which involves the right of the Appellate Courts in Louisiana to review questions

of fact as well as questions of law." (Petitioner's brief, p. 47).

### No Substance to Plaintiff's Claim

Even if plaintiff could overcome all of the jurisdictional and procedural difficulties in his claim under 42 U.S.C. 1983, there is in fact no substance to the claim which he makes. The gist of his complaint is that the First Circuit Court of Appeal reversed the trial court's judgment "on the credibility of one witness." It is a claim he has made at each level, and it is demonstrably incorrect. In fact, there were two witnesses whose testimony was before the court on the "one crucial issue" (Petitioner's brief, p. 7) which was finally decided against plaintiff. There was no contradictory evidence of any kind adduced on the issue by plaintiff.

It is axiomatic that the plaintiff has the burden of proving the assertions which he makes. Plaintiff's crucial assertion in this case was that the state was negligent in its placement of a stop sign at the "T" intersection *and* that the state's negligence was a cause-in-fact of his injury. The latter portion of the burden could only be fulfilled if plaintiff was successful in demonstrating that the other driver *failed to see* the allegedly misplaced stop sign. On this point, plaintiff adduced no evidence whatsoever. The only evidence on the point was offered by defendant, through the testimony of the other driver (Ronald Lloyd) and the sworn statement of his father, who

was in the car. Both stated that they *saw* the stop sign and that Ronald Lloyd *stopped* before entering the intersection. Visibility of the sign was also supported by the photographic evidence.

Not only is this clear evidence that any negligence of the state was *not* a cause of plaintiff's injury, it is the *only* evidence in the record on an issue on which plaintiff had the burden of proof.

Under the circumstances, the appellate court made the only decision which it could properly make, and plaintiff's assertion that the appellate decision rested on its opinion of the credibility of one witness is misleading. It is a matter of law, not fact, that plaintiff has the burden of proof, and the appellate court's conclusion is, based on the evidence which plaintiff presented, that "the plaintiff has fallen short of establishing his case." (Petitioner's brief, p. 41). And it was manifest error for the trial judge to conclude that plaintiff had established his case, judging from the record that was presented. The appellate court clearly so held when it stated "*the lower court committed manifest error in holding that the defendant was negligent, and that such negligence was a causative factor in the occurrence of the accident.*" It is hardly a denial of due process for an appellate court of three judges, a rehearing panel of five appellate judges, and a state supreme court to reverse, and approve the reversal of, manifest error of a trial judge, particularly on an issue on which plaintiff failed to discharge his burden of proof.

Undoubtedly, plaintiff strives to present this matter as one in which a single "fact" determination by a lower court was reversed out of hand by an appellate court so that he can make the argument to this Honorable Court that his federal constitutional rights have been violated.

It was precisely this argument which was previously made to this Honorable Court in this matter on the application for writs under the heading of "Fourteenth Amendment", and it was rejected. It was precisely this argument which was made to the federal district court in this litigation under the heading of "Section 1983" and it was rejected by dismissal and summary judgment in favor of the defendants. Then it was made to the Fifth Circuit, which was in effect, on these twice-rejected grounds, being asked to reverse the State Court of Appeal, the State Supreme Court, the Federal District Court, and the Supreme Court of the United States (see opinion of West, J., Petitioner's brief, p. 47).

This case is in many respects similar to *Parker v. McKeithen, et al.* No. 71-2499, 488 F.2d 553, decided by the Fifth Circuit on January 24, 1974. There, plaintiff complained of injuries received at the hands of a fellow inmate at the Louisiana State Penitentiary. He first filed suit against a number of defendants, including prison officials, state officials, the state itself and various insurance companies, in state district court. That court found plaintiff's evidence insufficient to establish negligence and ruled against him.

The trial court's decision was affirmed by the court of appeal, and then the Louisiana Supreme Court affirmed both decisions.

Plaintiff then turned to the federal courts, asserting a claim under 42 U.S.C. 1983 that due to the gross negligence of the prison officials acting under color of the state statutes, he had been deprived of his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to equal protection of the laws. The federal district court entered an order which the Fifth Circuit treated as a dismissal for failure to state a claim.

On appeal, the court held that summary judgment for the defendants was proper, but on different grounds from those cited by the district court for its order. The court felt that since plaintiff's federal claim under Section 1983 was based upon deprivation of rights through negligence, and since the issue of negligence had been litigated and decided against him in the state courts, collateral estoppel was a bar to the Section 1983 action in the federal court system.

In the course of its opinion in *Parker*, the court cited its own decision in *Hyman v. Regenstein*, 258 F.2d 502 (5th Cir. 1958), cert. den. sub nom., *Hyman v. Continental Illinois National Bank*, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575 (1959) and its discussion of collateral estoppel. The discussion is so appropriate that it is reproduced here:

> " 'It is a fundamental principle of jurisprudence that material facts or questions which were

> in issue in a former action, and were there admitted or judicially determined, are conclusively settled for a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issues may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. *In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.* * * *'" (Emphasis supplied)
>
> 258 F.2d at 510.
> (Emphasis supplied by the court in *Parker.*)

The emphasis was supplied by the court itself, and the emphasized sentence is particularly appropriate to the resolution of the issue presented in this litigation. It is well to hark back to the prayer of plaintiff's petition in this suit: he wants the Louisiana appellate judgment to be set aside as unconstitutional and the Louisiana trial court judgment to be "reinstated." The *effect* of the granting of such a prayer would be to declare this defendant *negligent* and to condemn it to pay plaintiff some $1.2 million in damages. But the issue of this defendant's *negligence* was, as in *Parker*, "the fundamental issue in the state court litigation"; and it was, as in *Parker*, aside from the question of damages, the only issue in the state

courts; and it was, as in *Parker*, "necessary to the judgment in the state court proceedings." (Slip decision, pp. 448-449). And this issue of this defendant's negligence was decided adversely to plaintiff.

Realizing perhaps that this perfectly justifiable objection might be made to a re-litigation of this issue already determined in state court, plaintiff has in this court apparently abandoned the portion of the prayer which seeks "reinstatement" of the Louisiana trial court judgment. Now he seeks only to have this court declare the Louisiana appellate judgment "unconstitutional." (Petitioner's brief, p. 23). It is not clear whether this means that the trial court judgment would then be effective, or whether then plaintiff would be entitled to a new trial and a fresh start entirely. If it is meant to be the former, then the same objections apply as were made to the "reinstatement" of the trial court judgment. And the additional question could be raised: would this reinstated judgment be appealable?

If it is meant to be the latter, and on the assumption that plaintiff might win again in the trial court, would *that* judgment be appealable? If so, would the appellate court be compelled to affirm or at least to review only on the law? In other words, could plaintiff achieve in this action what he could not achieve by prior petitions to the United States Supreme Court: a declaration that Louisiana's appellate review procedure is unconstitutional?

The Fifth Circuit's decision in *Parker* makes it clear

that plaintiff is barred by collateral estoppel from re-litigating, directly or indirectly, the negligence issue which was decided against him by proper appellate review procedure in the Louisiana state courts. This is what he is attempting to do in this Section 1983 action. If petitioner were successful, it would mean that every civil case appealed in Louisiana courts would then go the federal court route as the losing party could always claim that the appellate courts denied him due process and his civil rights by finding manifest error and reversing the trial court or by failing to find manifest error.

## CONCLUSION

It is clear that plaintiff's complaint fails to state a claim against this defendant upon which relief can be granted. In fact, in his complaint and in his motion for summary judgment and in his appeal to the Fifth Circuit and in his application to this court, plaintiff does not even pray for any relief as against this defendant. Of course, what he does ask for, if granted, would result in a money judgment against this defendant.

Plaintiff is attempting to re-litigate an issue (negligence of this defendant) which has been finally determined by the Louisiana courts, which were competent to decide the issue and decided it under constitutionally valid procedures. The prayer of plaintiff's original petition in this matter asks that the Louisiana appellate court judgment be "set aside" and the original trial court judgment be "reinstated". This would

result in automatic judgment in plaintiff's favor without re-litigation. In this Honorable Court, he appears to have backed down on this request, and now seeks only a re-litigation in the same courts of an issue already decided against him. The grounds for such a drastic order are deprivation of "civil rights" and "due process of law."

In opposing plaintiff's original application to the United States Supreme Court for writs, based on virtually the same grounds, this defendant stated:

> "Plaintiff is understandably distressed that in the final analysis his suit was unsuccessful. But the fact remains that, in perfect accordance with the Louisiana constitution and the federal constitution, the original three-judge appellate court concluded that manifest error had been committed by the trial judge; the *en banc* panel of five appellate judges re-affirmed that ruling by refusing a rehearing; and the Louisiana Supreme Court without dissent refused plaintiff's petition for certiorari."

One could now add to that list:

> "The United States Supreme Court has denied a writ of certiorari or review on the grounds here claimed; and the Federal District Court for the Middle District of Louisiana has granted a summary judgment in favor of all defendants and dismissed plaintiff's action for failure to state a claim upon which relief might be granted; and the Fifth Circuit Court of Appeals has affirmed the district court decision and has denied rehearing."

Plaintiff has been accorded exhaustive "process of law" in this litigation and presents to this Honorable Court a much weaker position on issues already decided adversely to him. It is submitted that the district court's judgment was eminently correct, and that its dismissal of plaintiff's action and its summary judgment in favor of this defendant should be affirmed in all respects, and plaintiff's petition to this Court for writ of certiorari should be denied.

Respectfully submitted,

By attorneys for the
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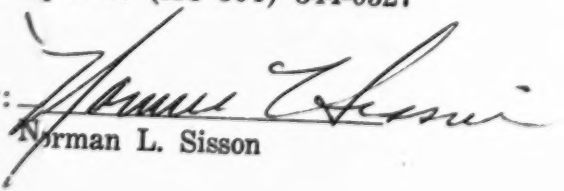
By: 
Norman L. Sisson

## CERTIFICATE

I hereby certify that copies of the foregoing have this day been mailed by United States mail, postage prepaid, to Arthur Cobb, Esq., Corporate One Building, Suite 3N, 5551 Corporate Boulevard, Baton Rouge, Louisiana 70808, of counsel for petitioner.

Baton Rouge, Louisiana, this 26 day of August, 1974.

Norman L. Sisson